FILED
JUL 25 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 282

ROSA MAYER, as Administratrix of Benjamin Mayer,
Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, ET AL.,
Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,
Intervening Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD F. UNGER,
Attorney for Petitioner,
200 Fifth Avenue,
New York, N. Y.

ROBERT M. COWEN,
BERNARD COWEN,
Of Counsel.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	6
Reasons for Granting Writ	11
Conclusion	20
Appendix A—Opinion of U. S. Court of Appeals	1a
B—Judgment of U. S. Court of Appeals	5a
C—Opinion of District Court	5a
D—Judgment of District Court	14a
E—Orders of various District Courts	24a
F—Opinion of State Court (1)	26a
G—Opinion of State Court (2)	27a
H—Agreement of Settlement (Case of State Court #1)	29a
I—Description of Facts (Case of State Court #1)	32a
J—Affidavit of Trustee's Asst. Vice Pres.	34a

CITATIONS

American Loan & Trust Co. v. Grand Rivers, 159 Fed. 775 7

Brown v. Pennsylvania Canal Co., 235 Fed. 269, 247 Fed. 467, 279 Fed. 417 ..... 12, 14, 15

PAGE

Chase National Bank v. Manila Electric Co., 40 N. Y. S. 2d 385 9
Colorado & Southern RR. Co. v. Blair, 214 N. Y. 497 9

Drascovich v. Equitable Trust Co., 3 Fed. 2d 724 7

Equitable Trust Co. v. Denver & Rio Grande RR. Co., 269 Fed. 437, 271 Fed. 49 6
Equitable Trust Co. v. Western Pacific Ry. Co., 232 F. 836, 244 F. 480, 250 F. 237 6

Fidelity Union Co. v. Fields, 311 U. S. 169 .....2, 12

Louisville & Nashville RR. Co. v. Robin, 135 Fed. 2d 704 .....4, 5, 8, 10, 12, 13, 14, 15, 18, 19

Matters of Continental Bank & Trust Co., N. Y. Law Journal, July 21, 1954 .....2, 4, 13, 17
Gubelman, 79 Fed. 2d 967 17
Interborough Consolidated Corp'n, 206 Fed. 2d 30 .....5, 8, 15, 16, 17, 19
Pulitzer's Estate, 249 N. Y. Supp. 87, 93 9
Searles, 166 Fed. 2d 475 .....5, 8, 15, 17, 19
Thompson's Estate, 192 Fed. 2d 451 .....15, 17, 19
Vulcan & Reiter, Inc., 162 Fed. 2d 94 15
Moscowitz v. Briskman, N. Y. Law Journal, Feb. 17, 1950 .....3, 4, 5, 12, 13, 17

T. J. Moss Tie Co. v. Wabash Ry. Co., 11 Fed. Supp. 277 9

Richman v. Irons, 121 U. S. 27 18

STATUTES

28 U. S. Code Sec. 1254 2
28 U. S. Code Sec. 2041 7
28 U. S. Code Sec. 2042 7

Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

ROSA MAYER, as Administratrix of Benjamin Mayer,

Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,

Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervening Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause for a declaratory judgment on April 30, 1956.

Opinions Below

The opinion of the Court of Appeals now sought to be reviewed was handed down on April 30, 1956 and is printed as Appendix A, page 26a. 1a

The opinion of the District Court (136 Fed. Supp. 83) dated September 6, 1955, is printed as Appendix C, page 5a.

The opinion of the State Court dated February 17, 1950 to which the opinion of the Court below was referred is printed as Appendix F, page 26a.

Jurisdiction

The judgment of the United States Court of Appeals of which review is sought was dated and entered on April 30, 1956 and is printed as Appendix B, page 5a.

The jurisdiction of this Court to review said judgment is invoked under 28 U. S. C., Sec. 1254.

Questions Presented

1. May the rule of the Supreme Court on diversity of jurisdiction be expanded far beyond the limitations expressed by the Court in *Fidelity Union Trust Co.* v. *Fields*, 311 U. S. 169 so as to require a Federal Court to give heed to two opinions or pronouncements, purporting to set forth authoritative State law, to decide whether well-settled principles of equity or federal law could be applied to the case at bar, where neither of said opinions or pronouncements was ever published in a standard law report but the printing thereof in each case was confined to the inner pages of a law journal of limited circulation in the City of New York and adjacent counties; where, in the case of one opinion, *Matter of Continental*

Bank & Trust Co. (Appx. G, p. 28a), no facts or law was set forth, reference being made to the unprinted report of a referee which the decision merely confirmed, and where, in the other case, *Moscowitz* v. *Briskman* (Appx. F, p. 26a) the opinion was so wanting in text, facts and the law to be derived therefrom, that a reading thereof could only involve one in the risk of assuming what those facts might be and the law to be derived therefrom, and of making the mistake, as was done in the case at bar, of adopting the wrong view of what were the true facts in the case and the law applicable thereto, and arriving ultimately at the decision that the District Court could not apply federal law and principles of equity to the instant case.

2. Where, in pursuance of a principle of equity heretofore applied in both federal and state cases to effect a variation in a trust agreement to enable the trustee to deviate from the limited provision thereof for the carry-out of the general purposes of the trust by some act on its part that would solve a bad situation that could not have been foreseen when the trust was first created, an action in equity, relative to the ultimate disposition to be made of a long unclaimed fund as the final step in the liquidation of the affairs of an insolvent corporation for the benefit of its creditors, bondholders or otherwise, was brought in the Federal Court in New York by a non-resident bondholder against said Trustee on notice to all persons who might be concerned with said fund; with the result that the District Court was thereby vested with jurisdiction over said Trustee and over the unclaimed fund for the further administration of said fund as a res for distribution in accord with well settled principles of equity theretofore applied in federal courts;

was it proper that the decision and judgment of the District Court on that score should be disturbed by the lower Court's decision that the Supreme Court's rule

on diversity of jurisdiction had to be regarded as the dominant factor in requiring the lower Court to decide that the supposedly authoritative *Continental Bank & Trust Co.* and *Moscowitz* v. *Briskman* cases should control the further administration and distribution of the unclaimed fund, virtually holding thereby that those absentee bondholders, who failed to present their bearer bonds for payment and stamping, must be forever deemed the beneficiaries of a perpetual and never-ending trust and not as creditors of an insolvent corporation under liquidation by the federal courts in San Francisco and New York, and that the District Court was therefore without authority to vary the trust or apply the well-settled principles of equity to determine what persons should be the ultimate distributees of the 31 year old fund of unclaimed dividends, and have the Trustee act as the Court's disbursing agent in the distribution thereof.

3. Is there not a conflict between the United States Court of Appeals for the Fifth Circuit and the lower Court herein, with respect to their treatment of unclaimed dividends arising out of the liquidation of corporations unable to meet their obligations to their bondholding creditors, the decision of the Fifth Circuit having been made in the District Court's cited case of *Louisville & Nashville RR. Co.* v. *Robin*, 135 Fed. 2d 704, 5th Cir., May 6, 1943, by the decision of the lower Court, that because of the diversity of jurisdiction rule, it must follow pronouncements in the State case purporting to be authoritative law of the State of New York applicable to the distribution of unclaimed dividends, and holding that a further distribution could not be authorized, irrespective of the time element involved, in line with equitable principles and federal law expressed by the Fifth Circuit.

4. Whether the lower Court's refusal to apply to the case at bar, the well settled principles of equity of the

Louisville & Nashville case, *supra,* which were espoused and applied by earlier panels of the U. S. Court of Appeals for the Second Circuit in the reported opinions in *Matter* of *Searles,* 166 Fed. 2d 475, 2d Cir. and *Matter of Interborough Consolidated Corporation,* 206 Fed. 2d 30, 2d Cir., July 18, 1951 can be explained away by the lower Court's statement that

> "cases adjudicating the rights of creditors as such in bankruptcy proceedings or creditors arrangements are of doubtful value where the question concerns the rights of creditors as cestuis que trustent of an express trust",

particularly so in light of the fact that the State case of *Moscowitz* v. *Briskman,* which the lower Court used so devastatingly herein to reverse the District Court, turns out to be a case of a creditors' agreement of settlement or composition, from which unclaimed dividends were expected to flow (Appx. F, H, I, pp. 26a-32a).

5. Whether, in the application of the rule of diversity of jurisdiction in the case at bar, consideration should not be given to the fact, that in the long drawn out liquidation of the affairs of the Western Pacific Railway, there were two federal courts involved, the one of primary jurisdiction in San Francisco, and the other one of ancillary jurisdiction in New York, and that in the New York action an order had been entered which required that Court to recognize the San Francisco Court as the one of principal jurisdiction and decree and regard proceedings in the New York as ancillary in character and in aid of the Court of primary jurisdiction, so that as an aftermath of the San Francisco Court's windup of its duties in disposition of the unclaimed dividends under its control on December 22, 1953, the windup of the New York Court's participation in the liquidation of the Railway's Company's affairs was proper procedure to that end.

Statement

Plaintiff's action was intended as the final phase in the long drawn out liquidation of the affairs of the Western Pacific Railway Company. In 1903, it had undertaken to form the Salt Lake City to San Francisco link of a new transcontinental railway system. At Salt Lake City, it was to join up with the Denver & Rio Grande Railroad. That circumstance accounted for the Denver & Rio Grande's interest in making attractive the $50,000,000 bonds that were offered for sale to the general public.

In March, 1915, the Western Pacific admitted that it was unable to meet its obligations to its bondholders. Thereupon the then Trustee, Equitable Trust Company commenced two actions in equity. The action brought in the Federal Court in San Francisco was for the foreclosure of the mortgage covering the railroad's properties. The proceedings therein were reported at great length in *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 232 Fed. 836, 244 Fed. 480 and 250 Fed. 327.

The second action to reach other assets of the Western Pacific was brought in the federal court in the Southern District of New York. The proceedings therein were reported in *Equitable Trust Company* v. *Denver & Rio Grande R.R. Co., et al.*, 269 Fed. 437 and 271 Fed. 49.

By an order made in the New York action on May 26, 1915, the Federal Court in San Francisco was declared to be "the Court of primary jurisdiction and principal decree"; the proceedings in the New York action were to be "ancillary in their character and in aid of the proceedings in said Court of primary jurisdiction".

The San Francisco action proceeded to a decree of foreclosure and sale. The Special Master realized a net of $17,727,725.55, from which there resulted a distribution to appearing bondholders of $352.89 on each $1000 bond presented.

In 1922, a fund approximating $18,000 in amount and representing distributive shares unclaimed, together with accumulations of interest thereon, still remained in the hands of the Master. As a matter of fact, no part of the proceeds of sale ever came into the hands of the Mortgage Trustee. A bondholder sought to have the accumulations of interest on hand apportioned amongst the appearing bondholders. No attempt was made to reach the unclaimed shares which certain bondholders had failed to claim. In *Drascovich* v. *Equitable Trust Co.*, 3 Fed. 2d 724, 9th Cir., the Court of Appeals held that the interest belonged to the non-appearing bondholders. The disposition of the unclaimed shares was not in issue; nevertheless, the Court indicated that at some future time, the doctrine of the case of *American Loan & Trust Co.* v. *Grand Rivers*, 159 Fed. 775, might be availed of to effect its distribution among bondholders who had never received payment of their claims in full.

In 1942, the $15,502.65 balance of the unclaimed fund which the Special Master had paid into Court, was transmitted to the Treasurer of the United States under what is now 28 U. S. C., Sec. 2041. It was the Treasurer of the United States who became Trustee of said fund and not the Mortgage trustee.

The final phase in the San Francisco action was reached on December 22, 1953 when, as a result of a proceeding brought under 28 U. S. C., Sec. 2042 on notice to the United States Attorney, the Chase National Bank, and to all bondholding creditors of the Western Pacific, an order was made, pursuant to which the $15,502.65 on hand was distributed by the United States Treasurer, acting in his capacity as statutory trustee of said fund.

At the end of said order of December 22, 1953, a direction was made for the filing of a certified copy of said order of distribution, with a copy of the Special Master's report of his proceedings in the New York court of ancillary jurisdiction.

In the administration and distribution of said fund of $15,502.65, the Federal Court in San Francisco applied the principles of equity or federal law stressed at length in *Louisville & Nashville R. R. Co.* v. *Robin*, 135 Fed. 2d 704, 5th Cir., May 6, 1943, and followed by *Matter of Searles*, 166 Fed. 2d 475 2d Cir., and *Matter of Interborough Consolidated Corporation*, 206 Fed. 2d 30, 2d Cir.

With the close of the San Francisco phase in the liquidation of the Western Pacific affairs, the bondholders holding 95.368 percent of the $50,000,000 bond issue, directed their attention to the New York fund of $21,649.65 then in the hands of the Chase National Bank.

Although the usual provisions in the trust agreement had been made for the payment of principal and interest on the September 2, 1933 date of the maturity of said $50,000,000 bonds and for the transfer of any unclaimed moneys on hand into the Company's treasury, no provision had been made as to the procedure in the event of the Company's having become insolvent in advance of the expiration date of the trust agreement. But it did become insolvent as early as the year 1915 and in 1954 when the action herein was brought, $21,649.65 remained in the hands of the Trustee. Its recoveries had been made not only from the $38,270,343.17 judgment against the Denver & Rio Grande but from other sources as well.

The $21,649.65 represented moneys which the holders of a very small number of bonds (40 to 55 out of a total of 50,000) had failed to claim. The number of bondholders could have been made up of a very small number. Among the appearing bondholders herein were persons who held 20, 30 and even 100 of the $1000 bonds. (Appx. p. 23a.)

In *Matter of Searles*, 166 Fed. 2d 475, 2d Cir., the Court opined that it was conceivable that a creditor could have received payment in full from other sources. This is as good a reason as that advanced by a State seeking to escheat unclaimed dividends, to wit, that the absentee bondholder had died intestate and without heirs.

The instant case was different from those hereinabove mentioned and those listed in Appx. E, p. 24a, in that the $21,649.65 was not in court in advance of the commencement of the present action. Steps were therefore taken to bring the fund and the custodian thereof under the Court's jurisdiction. The District Court for the Southern District of New York was chosen, not because there might be some impediment if the action were brought in a State court, but because the liquidation of the affairs of the Western Pacific had been entrusted to the Federal Courts in San Francisco and New York since March 1915 with the San Francisco court acting as the principal or primary court and the New York court as the ancillary court and in aid of the proceedings in the San Francisco court.

The rule of law approved by State and Federal Courts alike whereby a court of equity exercises its powers to vary a trust where a situation has arisen that had not been foreseen or provided for when the trust was created and which served to prevent a Trustee from doing something that should be done to carry out the general purposes of the trust, was availed of in the instant case. (*Matter of Pulitzer's Estate*, 249 N. Y. S. 87, 93; *Chase National Bank* v. *Manila Electric Co.*, 40 N. Y. S. 2d 385; *Colorado & Southern R. R.* v. *Blair*, 214 N. Y. 497 and *T. J. Moss Tie Co.* v. *Wabash Ry. Co.*, 11 Fed. Supp. 277.)

With the acquisition of jurisdiction over the fund and the custodian thereof, the Court was in a position to administer the same just as the District Courts in the eight cases shown in Appx. E., p. 24a had administered the law of the cases at hand, to wit, according to the well settled principles of equity, applied in the Federal Courts of Appeal of the Fifth, Second and Third Circuits.

The facts were undisputed. The Chase National Bank as Trustee adopted a neutral position. The State of New York intervened to assert that the Bank should have reported to it the existence of the fund and should have

turned over the same to the State under the latter's escheat laws. The Trustee maintained that the fund on hand was a common fund; that there had never been any part thereof set aside for any particular bondholder or any numbered bond; that when a bondholder appeared with a bond on which one or more of the distributive shares had not been paid, he was allowed his computed share thereof; that there had never been any adjudication or allocation of the amount any bondholder should receive out of the common fund (Appx. J, p. 34a).

The decision of the District Court authorized and directed the distribution of the $21,649.65 on hand to be made by the Trustee as the Court's disbursing agent to those whom the Court determined were the persons entitled to share in its distribution.

The State of New York appealed and it was in the course of its appeal that it raised the question for the first time of the diversity of jurisdiction and put forward a decision of an inferior court of the State as authoritative State law supposedly on the subject of unclaimed dividends arising out of the liquidation of an insolvent corporation.

That the decision and judgment of the District Court was reversed is a matter not only of regret but of serious import, since the opinion of the lower Court now becomes the last word on the entire subject of the disposition of long unclaimed dividends, seriously impairing the usefulness of the equitable principles developed in the *Louisville & Nashville* case in 1943 and ever since that time applied in various Federal Courts within the Second, Third, Sixth, Eighth, and Ninth Circuits.

Reasons for Granting the Writ

A. The Supreme Court's rule on diversity of jurisdiction has been expanded beyond the limits ever contemplated by that Court to reject well settled Federal law and principles of equity heretofore applied in Federal Courts.

In rejecting the District's Court application to the instant case of the principles of equity and federal law heretofore applied by Courts, all concerned with the question of the final disposition of long unclaimed dividends which bondholding creditors and others had grossly neglected and failed to claim, the lower Court has excused its unusual action by placing the responsibility therefor on the Supreme Court and its rule on diversity of jurisdiction.

Having had its attention called to an opinion rendered by an inferior court of the State of New York which expressed the dicta of a justice thereof who, in advance of any distribution to be made by an accounting trustee, was asked in the Trustee's complaint to instruct him what to do in the event that certain bondholders failed to present their bonds for the payment of their shares in the initial distribution and thereby left an unclaimed amount in the hands of the Trustee, responded thereto by setting forth his views on the relationship of a trustee to a bondholder-beneficiary under the trust agreement. Those views sounded good as they would to anyone concerned with the law. But their application to the instant case could only be made by bringing up the diversity of jurisdiction rule of this Court to show that the application of those views to the case at bar was one of compulsion or of obedience to a higher authority.

Those views could be applicable to trusts concerned with persons whose individuals or corporations that were solvent and where the rights of the beneficiaries could be

fixed at some definite amount or percentage. They were applicable in a case where an agreement of settlement of composition had been made and approved by a court or where a judgment had been entered under which a beneficiary-bondholder was to receive the consideration which he had bargained for or what was bargained for in his name. That was the situation in the New York cases and in the *Brown* v. *Pennsylvania Canal Co.* case, *supra*. It was never the case herein or in any of the cases wherein equity principles were applicable in the federal courts to long unclaimed dividends to be further administered or distributed (Appx. E., p. 24a).

Unfortunately, the opinion in *Moscowitz* v. *Briskman*, was the case in which those views on the law of trusts were expounded. The opinion was never published in any standard law report. It contains no description of the facts in the case or makes mention of anything which might be associated with the case at bar other than that the facts in the *Moscowitz* v. *Briskman* case were distinguishable from those in the *Louisville & Nashville* case to which the instant case bears a fair resemblance. If therefore the facts in the State cases were distinguishable from the *Louisville & Nashville* case, then they should be distinguishable from and not analogous to the case at bar.

In the case of *Fidelity Union Trust Co.* v. *Fields*, 311 U. S. 169, where this Court declared that it would accept as State law a decision of an intermediate appellate Court, it also stated that it expected that one would be in a position to "ascertain" from the decision of the State court just what were the facts back of the decision and exactly what was the law in point. One cannot tell from a reading thereof what were the facts in the *Moscowitz & Briskman* case or what is the law to be derived therefrom.

To ascertain those facts, one had to go through the voluminous files of the *Moscowitz* v. *Briskman* case in the office of the County Clerk and one then "ascertains" that

the fund in question was expected in the future to grow out of an agreement of settlement entered into by the Trustee with the approval of the Court and binding on all of the bondholder beneficiaries whereby, in consideration of the Trustee's sale of his interest in the mortgaged property, a definite cash sum would be paid to the Trustee to divide up among those bondholders who did not participate in the syndicate acquiring said interest.

In the Appendix herein (pp. 29a-32a) appears the proof of the settlement agreement so that it will be evident that the *Moscowitz* v. *Briskman* case, that was represented as authoritative State law, should not have been made effective by an expansion of the Supreme Court rule.

As to the authoritative law of the State of New York to be derived from the opinion made in *Matter of Continental Bank & Trust Co.*, to which equal respect was accorded by the Court below in setting forth its obligation under the Supreme Court's rule of diversity of jurisdiction to decide the question of the application of well settled federal law and equitable principles to the case at bar, the less said the better. According to the opinion in that case (Appx. G, p. 28a) one must search through the filed papers in the case to find out just what facts the referee had reported and what law he had derived therefrom. Certainly, the responsibility for the lower Court's acceptance of New York law under those circumstances should not be shifted to the shoulders of the Supreme Court.

B. Conflict between the Second and Fifth Circuits.

There is a conflict between the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Louisville & Nashville R.R. Co.* v. *Robin*, 135 Fed. 2d 704, 5th Cir., May 6, 1943 and the decision of the lower Court in the case at bar.

In the *Louisville & Nashville* case, *supra*, the Court of Appeals for the Fifth Circuit was concerned with a trustee-held fund of upwards of $10,000, which had arisen out of the foreclosure of a railroad mortgage given to secure payment of principal and interest on an issue of First Mortgage Bonds. The Trustees had made their distribution of the net proceeds of the sale of the railroad's properties as far back as the year 1880 so that the $10,000 balance on hand represented the amount on hand which had remained over a period of more than 60 years. There had never been any adjudication as to what persons had been the holders of the unpresented bonds and interest coupons, the extent of their holdings, or the reasons why the holders of said bonds in 1880 had neglected and failed to establish their interests, if any, as creditors, trust beneficiaries or otherwise, in the years that followed.

The Fifth Circuit held that the final disposition of the unclaimed fund had been delayed too long; that the District Court, then having the same in its hands as a res for distribution, had full jurisdiction to determine who should make up its distributees; that in the administration of the fund, it should fix a date by which claims against said fund should be filed in order that claimants might participate in said distribution; and that it should effect its distribution, with those claimant holders of said First Mortgage Bonds who had established that their claims still remained to be paid in full, having a right to share therein, prior to the right of any other existing class of bondholders or creditors.

In the opinion of the Court of Appeals in the *Louisville & Nashville* case, reference was made to the opinions rendered in *Brown* v. *Pennsylvania Canal Co.*, 235 Fed. 269, 247 Fed. 467, 279 Fed. 417, 3rd Cir. There the unclaimed fund grew out of an action by the Pennsylvania R.R. Co., to acquire outright the properties of the Canal Company which it had used under a lease. The judgment

fixed the value of the properties so that what each bondholder was to receive and received was his fractional share in the judgment. He could not receive any more from any source, certainly not from the shares of his fellow bondholders who had not appeared with their bonds to make claim thereto. The judgment was like an order approving a composition agreement under which a creditor receives all that he has been deemed to have bargained for and having received said amount, is regarded as having been paid in full (*Matter of Vulcan & Reiter, Inc.*, 162 Fed. 2d 94, 2d Cir.).

The *Brown* v. *Pennsylvania Canal Co.* case, *supra*, is referred to herein because it was stressed in the dissenting opinion in the *Louisville & Nashville* case. The lower Court was apparently impressed therewith and seemingly has sought to bring up a question of law that the majority opinion in the *Louisville & Nashville* case overruled. It was brought up again without success in the Second Circuit in the *Searles* and *Interborough Consolidated* cases, *supra*. In the dissenting opinion aforesaid, a suggestion was made that the case be carried up to the Supreme Court, a suggestion that was neither taken seriously by the United States Attorney in Louisiana or by the Department of Justice in Washington. That no conflict with the Court of Appeals for the Third Circuit was involved therein became evident in more recent times with that Court's adoption of the principles of equity herein adopted by that Court in *Matter of Thompson's Estate*, 192 Fed. 2d 451, 3rd Cir.

It might be again noted that the fund herein not only arose from the judgment in the action of the Trustee against the Western Pacific and the Rio Grande but from other assets of the Western Pacific found within the jurisdiction of the New York Court acting ancillary to the federal court in San Francisco.

C. The unwarranted expansion of the rule on diversity of jurisdiction has resulted in a conflict of decisions in the Second Circuit.

There is a conflict between the decision of the United States Court of Appeals for the Second Circuit in the case of *Matter of Interborough Consolidated Corporation* (*Corn Exchange B & T Co.*, 206 Fed. 2d 30, 2d Cir., July 20, 1953 (Swan, C.J., Learned Hand & Augustus N. Hand, C.Js.) and the decision of the lower court in the case at bar.

In this earlier case in the Second Circuit, the Court of Appeals was concerned with two unclaimed funds approximating the sum of $30,000. One fund of approximately $7,000 arose out of the Mortgage Trustee's sale of the collateral given as security for the payment of principal and interest on the bonds. The $7,000 represented the total of the amounts which certain holders of the Corporation's bearer bonds might have received had they presented their bonds and interest coupons for payment. This fund was never paid into Court but continued to remain in the hands of the Mortgage Trustee, Empire Trust Company, for upwards of 30 years.

No bondholder ever received more than a small fraction of the amount called for by his bond.

The other fund was made up of the aggregate sum turned over by the Trustee in bankruptcy to the Mortgage Trustee on the latter's deficiency claim. It represented the balance on hand to which certain unknown holders of the Corporation's bearer bonds might have made claim. Here again, there was no record or adjudication to show what persons had been the holders of the unpresented bonds and coupons or the extent of their holdings or the reasons why they had failed to avail themselves of the opportunities presented to them to claim what might be due them.

The Court of Appeals for the Second Circuit, having noted that all parties, bondholders, creditors and the like,

had been given notice of the proceedings, cited *Matter of Searles*, 166 Fed. 2d 475, 2d Cir., Feb. 18, 1948, *Matter of Gubelman*, 79 Fed. 2d 976 2d Cir., and *Matter of Thompson's Estate*, 192 Fed. 2d 451, 3rd Cir., as authorities for the exercise of its equitable powers to direct the distribution of both funds to and among those bondholders who had appeared and had established that the face amounts of their respective bonds had never been paid in full.

In the instant case, the lower court would not allow itself to be persuaded by the precedents and principles of equity stressed in said *Matter of Interborough Consolidated Corporation, supra*, declaring for one thing that "cases adjudicating the rights of creditors as such in bankruptcy proceedings or creditors arrangements are analogies of doubtful value where the question concerns the rights of creditors of *cestuis que trustant* of an express trust".

At another point, the lower court declared that whether in the case at bar there were equitable principles, such as those developed in the cases cited by the District Court, would have to be decided by the law of the New York cases of *Moscowitz* v. *Briskman, supra*, and *Matter of Continental Bank & Trust Co., supra*, because the rules of the Supreme Court on diversity of jurisdiction required the lower court to give heed thereto.

D. The unwarranted expansion of the rule on diversity of jurisdiction has resulted in a conflict of decisions in the Second Circuit.

There is conflict between the decision and an earlier decision of the United States Court of Appeals for the Second Circuit in the case of

> *Matter of Searles*, 166 Fed. 2d 475, 2d Cir. February 18, 1948 (Swan, C.J., Chase and Frank, C.J.s.)

and the decision in the instant case which should be resolved by the Supreme Court.

In this earlier case of the Second Circuit, the equity principles which control the further administration and distribution of long unclaimed dividends were discussed at length. It was brought out therein that Congress contemplated, in its inclusion of Sec. 66b of the Bankruptcy Act of 1898, that in the final stages of the liquidation of an insolvent, some final order of distribution should be brought about, either on the instance of an unpaid creditor or on the initiative of the Court, whereby no unclaimed funds would continue to remain on hand. In Sec. 66a of said Act, provision was made whereby the unclaimed fund would be paid into Court so that the Clerk thereof, acting as a statutory trustee, might distribute the fund for the benefit of the beneficiaries of the trus, namely to members of that class of creditors who appeared to be entitled thereto. That would not mean to every member of that class, but only to those members who established that their proved claims had not been paid in full.

Under the equity principles discussed by said Court, the latter pointed out that where some members of said class of unpaid creditors failed to appear, one could conceive that the reason for non-appearance was the fact that, in some other way or manner, they had received full payment of their respective claims. And holding that no one should participate in the distribution of a long unclaimed fund of the character herein who, after notice to him given, had failed to appear or press his claim, and citing the cases of *Louisville & Nashville RR Co.* v. *Robin, supra,* and *Richmond* v. *Irons,* 121 U. S. 27, said Court of Appeals exercised its equity powers to direct the distribution of the 48 year old unclaimed fund to these who made appropriate claim thereto.

In the closing words of its opinion, the Court of Appeals described the proceeding before it not as a bankruptcy

proceeding, but as an equitable proceeding to which the equity principles of *Louisville & Nashville RR Co.* v. *Robin, supra,* were applicable.

In the instant case, the lower court responded to the earlier panel's description of the principles of equity involved in said *Matter of Searles, supra,* case, by merely stating that cases in bankruptcy were of doubtful value as authorities where the rights of beneficiaries of an express trust were concerned. It utterly failed to note that if equity principles growing out of equity receivership cases are applicable in bankruptcy proceedings as the Court of Appeals in the *Interborough Consolidated Corporation* case, *supra,* had held, then the converse should be true, namely, that equity principles growing out of bankruptcy proceedings should be applicable in cases of equity receiverships.

E. The resolving of the questions herein presented are of considerable importance in the administration by federal courts of long unclaimed dividends of the character herein described.

The Supreme Court's determination of what should be the final word of the United States Court of Appeals for the Second Circuit on the subject is most to be desired. Already, the decision of the lower Court, even though based on a supposed law of the State of New York to which so much importance has been attached by the application of an unwarranted expansion of the rules of the Supreme Court on diversity of jurisdiction, has had a far-reaching effect that could not be anticipated. The list of cases set forth in Appendix E, page 24a, to which might be added the *Matter of Thompson's Estate,* 162 Fed. 2d 45, 3rd Cir., shows to what extent the principles of equity heretofore expressed by the Courts of Appeals for the Fifth and Second Circuit have been respectfully adopted and applied in various States in the United States. A doubt as to the correctness of

those decisions and resultant distributions has been engendered by the decision rendered by the lower court herein which will plague the courts for a long time to come if a remedy is not applied at this time.

It would be sad, indeed, if the application of the equity principles to a case where a long unclaimed fund is finally brought into Court by the application of the Court's equitable powers to vary the 1903 instrument to permit that step to be taken, should be prevented by dubious interpretations of the decisions of two New York cases that had never been regarded as of sufficient importance as to be published in any standard law report, decisions which concerned the trust relationship of parties to a settlement or composition agreement rather than the relationship of bondholding-creditors to their insolvent debtor.

CONCLUSION

Wherefore, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

Edward F. Unger,
Counsel for Petitioner.

Robert M. Cowen,
Bernard Cowen,
Of Counsel.

July 25, 1956.

APPENDIX A

Opinion of Court of Appeals—Second Circuit, Decided April 30, 1956.

Before CLARK, Chief Judge; MEDINA, Circuit Judge, and GALSTON, District Judge.

MEDINA, Circuit Judge—This is a suit, based on diversity jurisdiction, for a declaratory judgment. The summary judgment from which this appeal is taken orders the defendant, Chase National Bank, to distribute certain funds to the plaintiff and other known holders of Western Pacific Railway mortgage bearer bonds issued in 1903 and in default since 1933. Reversal is sought by the appellant, the State of New York, an intervening defendant, and by attorneys appointed by the District Court to represent absent and unknown bondholders.

The source of the fund involved in this controversy is recoveries made between 1918 and 1925 on a judgment obtained by the mortgage trustee against Denver & Rio Grande Railway, which had guaranteed payment of principal and interest on the Western Pacific bonds. From the money thus recovered, the trustee made available to bondholders seven distributive shares, proportionate to their holdings. Some bondholders, whose identity is not known, did not present their bonds for one or more of their pro rata distributive shares. This unclaimed money, which is the subject of the District Court decree, is presently held in trust subject to the terms of the trust agreement between the Bowling Green Trust Company of New York, predecessor trustee of defendant Chase National Bank, and Western Pacific Railway, under which Western Pacific in 1903 issued the above mentioned bonds.

The agreement is quoted in the opinion below as providing that: "The trust was 'created for the equal and proportionate benefit and security of all holders of the

bonds and interest coupons issued and to be issued under and to be secured by this indenture.' Section 9 of Article 4 of the indenture provides that any money received by the Trustee 'shall forthwith be applied by the Trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part.'" As the court below noted, the trust indenture makes no provision for forfeiture. Since plaintiff and other known bondholders, all of whom are intervening "defendants" and who together constitute over 95 per cent of all bondholders, have already received their full pro rata share of the money recovered on the guaranty, they are not entitled by the terms of the trust to any further participation in the fund. The complaint seeks a judgment declaring that the circumstances of the case require the trustee "to deviate or depart from the terms of said agreement."

The court below, adopting the views expressed in *American Loan & Trust Company* v. *Grand Rivers Company* (W. D., Ky., 159 Fed., 775) and *Louisville & Nashville Railroad* v. *Robin* (5 Cir., 135 F., 2d, 704), ordered the distribution as "consonant with equitable principles." This, however, is a question that must be decided in accordance with New York law, where, as in the case before us, federal jurisdiction rests on diversity of citizenship (*Erie R.R.* v. *Tompkins*, 304 U. S., 64; *Guaranty Trust Co.* v. *York*, 326 U. S., 99). Moreover, we are directed by the Supreme Court to give respectful heed to the pronouncements even of inferior state tribunals of record (*Fidelity Union Trust Co.* v. *Field*, 311 U. S., 169 [1940]; *Six Companies* v. *Joint Highway District No. 13*, 311 U. S., 180).

New York courts have twice, at least, considered the question before us. The leading case is *Moskowitz* v. *Briskman* (N. Y. L. J., February 17, 1950, Botein, J., in

Special Term, aff'd 278 App. Div., 761). There, as here, the trust indenture provided that the security for the bond issue, a mortgage, was to be held in trust "for the equal and proportionate benefit and security of all present and future holders of said bonds and coupons, without preference * * *." The court construed this to mean that the funds were not payable to the bondholders as a class, but rather to each severally in proportion to his holdings. Accordingly, it denied the secondary distribution of unclaimed shares requested in the complaint. This case was followed in the considered opinion of the referee in *Matter of Continental Bank & Trust Company* under date of May 6, 1954 (Supreme Court, New York County, Index No. 12961—1952, approved and confirmed at Special Term by Justice Rabin, N. Y. L. J., July 21, 1954). In both cases the courts were urged to follow *Louisville & Nashville Railroad* v. *Robin* (*supra*), but refused to do so on the ground that the cases were factually distinguishable. Though the precise distinction those courts had in view is somewhat unclear, this is unimportant in view of the fact that we see no reasonable basis for distinguishing the New York cases from the one at bar.

These cases, contrary to plaintiff's contention, do not "nullify" section 198 of the New York Debtor and Creditor Law. That section, the context of which is a proceeding to discharge an insolvent debtor, directs the trustee for the benefit of creditors to consider as relinquished dividends remaining unclaimed for one year and to distribute such dividends to other creditors. In both application and effect this statute, as plaintiff herself points out, is analogous to sections 66a and 66b of the Federal Bankruptcy Act. But it has never been seriously suggested that the Bankruptcy Act was "nullified" by or even inconsistent with such cases as *Drascovich* v. *Equitable Trust Company* (9 Cir., 3 F., 2d, 724) and

United States v. *Cochrane* (5 Cir., 87 F., 2d, 3; see also *Brown* v. *Penn. Canal Co.*, 274 Fed., 467, aff'd 279 Fed., 417). And, authority aside, we think it plain that cases adjudicating the rights of creditors as such in bankruptcy proceedings or creditors' arrangements are analogies of doubtful value where the question concerns the rights of creditors as cestuis que trustent of an express trust.

In view of our holding that the interests of the unknown bondholders in the fund are several and should not be turned over to the known bondholders, the cross-claim of the State of New York against the trustee alleging that the fund is abandoned property under section 300(1)(a)(v) of the New York Abandoned Property Law becomes relevant. The trial judge did not pass on this claim. Since no motion for summary judgment was made by the State of New York, and since we may not consider the merits of the claim of bona vacantia on the present record, the cross-claim is remanded to the District Court to be disposed of in due course. We express no opinion on whether New York has a claim upon which relief can be granted or whether the District Court has jurisdiction to entertain the claim.

On remand, the trial court should also determine what further efforts should be made to locate the missing bondholders.

Reversed and remanded.

APPENDIX B

Judgment of U. S. Court of Appeals, Second Circuit.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Upon consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this Court; with costs taxed in favor of the appellant.

s/ A. Daniel Fusaro,
Clerk.

APPENDIX C

Opinion of the District Court, dated September 6, 1955.

136 Fed. Supp. 83.

Ryan, J.

Plaintiff bondholder moves for summary judgment in this declaratory judgment suit filed against defendant Trustee and certain named bondholders. The question presented is the proper distribution, as between various bondholders having different interests, of a fund held by defendant Trustee under a mortgage securing bonds issued by the Western Pacific Railway Company. The fund consists of the unclaimed balance of seven separate distributions made available to the bondholders from the proceeds of a money judgment recovered by the Trustee against the guarantor of these bonds. The complaint seeks a determination by the court that all classes of bondholders are adequately represented so as to cause a decree

to be binding on all, and an instruction to the Trustee that it pay over to plaintiff and the known bondholders these unclaimed moneys. The answer of the Trustee asks that the court determine whether, in the light of applicable principles of equity, a decree may properly be rendered directing that the fund be distributed to the holders of bonds who come forward to claim their distributive share. It does not support or oppose the motion.

Jurisdiction is predicated on diversity—plaintiff is a citizen of the State of Maryland and defendant Trustee a New York corporation. The corpus of the fund amounting to $21,649.65 is on deposit in this district. This court has jurisdiction over the parties and the subject matter.

This suit was filed on April 14, 1954; on April 23, 1954, on motion of plaintiff and by order of the court notice of the pendency of this suit was given by publication and copy of the notice was mailed to the known bondholders who had shared in all seven distributions. Several bondholders thereafter appeared and answered the complaint, joining with plaintiff and the original defendant bondholders in the prayer for distribution. Although these known bondholders appear as formal defendants they are aligned in interest with plaintiff.

On June 1, 1954, on motion of the Trustee additional notice of the pendency of this suit was given by publication to those bondholders who had not received all seven distributions and two attorneys were then appointed by the Court as special guardians, one to represent those bondholders who had shared in some though not all distributions and the other, to represent those who had shared in none. The special guardians oppose the granting of this motion for summary judgment on the ground that neither under the indenture nor under applicable principles of law may the rights of the bondholders they represent be cut off in favor of and to the sole benefit of the known bondholders.

Appendix C.

No issue of fact is presented.

The following facts appear undisputed. Western Pacific Railway Company and the predecessor trustee to defendant entered into a mortgage dated September 1, 1903 to secure the payment of principal and interest on a $50,000,000. bond issue known as First Mortgage Five Per Cent Thirty-Year Gold Bonds due September 1, 1933. On the same day, a contract of guaranty for the payment of interest and stipulated sinking fund was entered into between the predecessor of the Denver and Rio Grande Railway Company as guarantor, and Western Pacific and the trustee. Upon the default of Western Pacific in the payment of interest, the trustee on March 2, 1915 filed suit in the United States District Court for the Northern District of California for foreclosure of the mortgaged property and recovered on the foreclosure sale the sum of $17,727,725.55, from which there resulted a pro rata distribution on each $1,000. bond of $352.89. On March 27, 1915, suit was filed in this court by the trustee against the guarantor on its contract. The trustee recovered a judgment in that suit of $38,270,343.17, out of which there was made available in seven separate and additional distributions, commencing September, 1918 and terminating June 30, 1925, the total sum of $393.50 on each $1,000. bond. (*Equitable Trust Co.* v. *Western Pac. Ry. Co.*, 244 Fed. 485, *aff'd sub nom. Equitable Trust Co.* v. *Denver & R. G. R. Co.*, 250 Fed. 327 (C A 2, 1918)). Although that action was tried on the equity side and the complaint was referred to as being on a "dependent bill in equity, ancillary to a bill of foreclosure," the judgment recovered was based on the contractual liability of the guarantor. On appeal, the judgment was affirmed but the cause was ordered transferred to the law side of the court and the various injunctions were vacated. The Court of Appeals held that plaintiff had brought in equity what was an ac-

tion at law on a contract and that all it had recovered was a money judgment for such breach.

Plaintiff and all bondholders appearing herein have received a total pro rata share on each $1,000. bond of $746.39 ($352.89 on the foreclosure sale in California, and $393.50 from the judgment in this court), leaving unpaid on the principal of each bond the sum of $253.61. No bondholder has received full payment.

It is the undisbursed balance of the funds collected on this judgment (as of November 17, 1953 it amounted to $21,649.65), which plaintiff and the bondholders seek to have paid to them.

The distribution of this fund is controlled by the terms of the Trust Agreement of 1903; the fund was never and is not now in the custody of the court.

The question presented is whether after the passage of thirty years the rights of unknown bondholders to their pro rata share under the indenture may be cut off by a distribution to present, known bondholders, who represent bondholders owning about 95% of the outstanding bonds.

The trust was created "for the equal and proportionate benefit and security of all holders of the bonds and interest coupons issued and to be issued under and to be secured by this indenture." Section 9 of Article 4 of the indenture provides that any moneys received by the Trustee "shall forthwith be applied by the Trustee to the payment *pro rata* of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part"; and that "the amount so payable shall in each case be paid only upon presentation of the bond . . ., and the amount of such payment shall be endorsed thereon." Section 13 of Article 5 provides for payment "in every instance to be made ratably, and without any preference or priority, upon presentation of the respective bonds", and Section 15 that the

Appendix C.

Trustee "shall not be bound to recognize any person as bondholder unless and until his title to the bonds held by him is proved in the manner prescribed." The indenture makes no provision for forfeiture of the bonds for non-presentation and is silent as to the course to be followed by the Trustee in case of impossibility of compliance with the above directions.

The terms of the indenture have been construed by the United States District Court for the Northern District of California, which entertained the *in rem* foreclosure suit, and the Court of Appeals for the Ninth Circuit, as setting up an equitable right to pro rata distribution in favor of each individual bondholder and not in favor of all the bondholders as a class. (*Drascovich* v. *Equitable Trust Co. of New York*, 3 F. 2d 724 (1925)). There, a bondholder who had received his proportionate share of the proceeds of the foreclosure sale, petitioned the court for a distribution of the interest which for a period of seven years had accumulated on the balance of the fund payable to non-appearing bondholders. The Court held that the burden of establishing a right to the pro rata share of the fund belonging to the other bondholders, who had failed to claim it, had not been sustained by petitioner and denied his petition. Whether the comparatively brief period of time the fund had remained unclaimed (7 years) prompted the Court is not apparent from the decision; in any event, in December, 1953, upon a subsequent petition filed by plaintiff here and present bondholders, the district court in California distributed to them pro rata the balance of that fund.

In *American Loan & Trust Co.* v. *Grand Rivers Co.*, 159 Fed. 775, the balance of a fund from a foreclosure sale payable proportionately to the bondholders had remained unclaimed by some for fourteen years. It was held by the court that although the money had been paid into

court in special trust for the particular purpose of paying each bondholder his share, if it was not claimed by them then it was manifest "upon the face of the record in the case, that it should by redistribution, be paid to the other bondholders, very much the larger part of whose debts were not paid" by the first distribution. In a similar situation (*Louisville & N. R. Co.* v. *Robin*, 135 F. 2d 704) the general rule was stated to be that, where some members of a class could not be found, redistribution to other members would follow.

While in these cases the fund to be distributed was in the hands of the court, and here it is not, the similarity of the position in which the appearing bondholders there and here find themselves leads this court to the conclusion that the view expressed therein is the only one consonant with equitable principles.

The action is one for a declaratory judgment. Plaintiff and the defendant bondholders aligned in interest with her represent 95% of the bondholders; this is a more than adequate representation of the beneficiaries of the trust indenture; the remaining 5% of the beneficiaries (representing about 55 bonds) have failed to claim their share for a period of 30 years and all reasonable efforts made to locate them through publication and notice by mail have proved fruitless; the probability of their appearing in the future is remote. Adequate legal notice has been given them and their interests are fairly represented by the guardians appointed. The Trustee is before the court and makes no objection to the proceedings. There is sufficient representation of the bondholders to make the decree of this court binding on the unknown bondholders. *T. J. Moss Tie Co.* v. *Wabash Ry. Co.*, 11 F. Supp. 277; *Colorado & Southern Ry. Co.* v. *Blair*, 214 N. Y. 497.

The power of a court to interpret the terms of a trust agreement in a manner seemingly contrary to expressed

provisions in order to accomplish the general overall purpose and intent of the agreement must be warily and cautiously exercised. It should not so act from a feeling that it would be more advantageous, or wiser or fairer to the beneficiaries, nor should it act to give preferential treatment to some beneficiaries over others. *Matter of Roe*, 119 N. Y. 509. But, it is a cardinal principle that a trust is to be administered so as to secure to its beneficiaries the benefits intended. And where it appears that by reason of an emergency or a change of conditions unforeseen by the settlor the accomplishment of the trust has become impossible and the means unworkable, the court may authorize a trustee to do something which is not expressly permitted or which is forbidden by the trust in order to carry out its general purpose. *In re Pulitzer's Estate*, 249 N. Y. S. 87, 93; Trusts and Trustees, Bogert, Vol. 3, Part I, Secs. 561-62; Re-statement Law of Trusts, Sec. 167.

The underlying principle was well stated in *In re New* (1901) 2 Ch. 534:

> " . . . The Court may, on an emergency, do something not authorized by the trusts. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen or provided for by the author of the trust where the circumstances require that something should be done.
>
> * * * *
>
> "It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction. . . . * * * But each case brought before the Court must be considered and dealt with according to its special circumstances."

Appendix C.

In *T. J. Moss Tie Co.* v. *Wabash Ry. Co., supra,* the court was asked to alter the terms of a trust so as to permit the release of certain property under a corporate mortgage. Although such a release was clearly not within the authority of the trustee, the court directed a departure from the trust instrument upon a finding that it was in the best interest of the beneficiaries.

The primary purpose of the 1903 indenture agreement was to guarantee to the bondholders full payment of their bonds by September 1, 1933; this, the Trustee was to endeavor to do by payment *pro rata* to each bondholder upon presentation of his bond; none of the bondholders who have received their proportionate share under all the distributions have been paid in full; there is a balance which if paid over would work a reduction of the debt due to 95% of the bondholders, but which under the terms of the trust the Trustee may not pay; the holders of the balance of the bonds—all bearer bonds—are unknown. A change of conditions not anticipated and not provided for by the settlor has created a situation where strict compliance with the terms of payment under the agreement will frustrate its purpose with respect to most of the beneficiaries.

I hold that plaintiff and defendant bondholders are entitled to the unclaimed fund in the hands of the Trustee, after payment of necessary costs incident to this suit according to their pro rata share.

In this suit, the Attorney General of the State of New York was permitted to intervene on behalf of the People of the State of New York. He has not moved for summary judgment but he does oppose plaintiff's motion on the ground that an issue of fact exists, namely, that these funds constitute abandoned property under Sec. 300 of the Abandoned Property Law of New York. In his answer to the complaint, he has cross-claimed against defendant

Appendix C.

Trustee alleging that at the expiration of fifteen years from the date of the last dividend, these moneys should have been turned over to the State Comptroller as abandoned property, and he prays that the complaint be dismissed and that the Trustee be required to pay over the fund to the State Comptroller.

In view of the conclusions reached I find it unnecessary to further consider the applicability of the New York Abandoned Property Law.

Motion granted; the rights of the parties are declared as above indicated. Settle proposed judgment and applications for allowances on notice to all who have appeared.

September 6, 1955.

SYLVESTER J. RYAN,
U. S. D. J.

APPENDIX D

Judgment and Order Granting Summary Judgment, dated November 21, 1955.

The above entitled action for a declaratory judgment having been commenced on April 15, 1954 with the service of a summons and complaint on the above named defendant, Chase National Bank of the City of New York (now the Chase Manhattan Bank) as successor Trustee under the agreement made on September 1, 1903 as hereinabove set forth, and the plaintiff in her complaint having demanded judgment

"1. That this Court determine whether the owners and holders of the First Mortgage 5% Thirty Year Gold Bonds of the Western Pacific Railway Company due September 1, 1933, issued and outstanding, are adequately represented in this action as may be required by law so as to cause a decree rendered in the action as required by law to be binding upon all of the holders of said bonds or whether other bondholders should be brought in and made parties to the action.

2. That this Court determine whether the circumstances hereinabove set forth require the Chase National Bank of the City of New York (now the Chase Manhattan Bank) as Trustee of the trust created by the agreement of September 1, 1903 to deviate or depart from the terms of said agreement with respect to the application of the moneys which continue to remain in its hands unclaimed and call for its being instructed as to its duties in the further administration of said moneys as might be appropriate in the premises to the end that said moneys may be distributed to such distributees as by this Court may be

determined, such distribution to be made by the Chase National Bank of the City of New York (now the Chase Manhattan Bank) as Trustee direct to the distributees named, or by the Clerk of the Court after the balance of said moneys in the hands of said Trustee shall have been paid into Court for that purpose.

3. That the expenses of the plaintiff and the defendant, Chase National Bank of the City of New York (now Chase Manhattan Bank) as Trustee in connection with the action herein, including counsel fees, be determined and declared to be expenses incurred in completing the execution of the trust created by said agreement of September 1, 1903."

and said defendant Chase National Bank of the City of New York as trustee, having duly appeared by its attorneys, Milbank, Tweed, Hope & Hadley, Esqs., and having made answer to said complaint on May 26, 1954 and having demanded judgment

"1. That the Court determine whether the bondholders are adequately represented in this action as may be required by law so as to cause a decree rendered herein to be binding upon all the bondholders;

2. That the Court determine whether, in the light of applicable principles of equity, a decree may properly be rendered herein in effect directing that the fund referred to in the complaint be distributed exclusively to the holders of First Mortgage Five Per Cent Thirty-Year Gold Bonds who come forward to claim their distributive shares upon such terms and conditions as to this Court may be deemed appropriate;

3. That the compensation and expenses of defendant The Chase National Bank of the City of New York

as trustee, including the compensation and expenses of its attorneys, be determined and allowed as expenses to be paid out of said fund;

4. That said defendant have such other and further relief in the premises as to this Court may be deemed appropriate;"

and defendants, Western Pacific Railroad Corporation, by Alexis I. duPont, Receiver, owner and holder of $47,451,500 of the $50,000,000 of First Mortgage Five Per Cent Thirty-Year Gold Bonds due September 1 1933, (hereinafter sometimes referred to as "said Bonds"), issued pursuant to the Western Pacific Railway Company Mortgage, Wells Fargo Bank & Union Trust Company and Helene W. Preis as trustees under the Will of Sanford Sachs, deceased, owners and holders of $30,000 of said Bonds, John M. Wilmans as executor of Lillian Wilmans, deceased, owner and holder of $5,000 of said Bonds, Leo V. Korbel, owner and holder of $15,000 of said bonds, and Bank of America Trust & Savings Association, owner and holder of $30,000 of said Bonds, having appeared by their attorney Bernard Cowen, Esq., and having served their answer on May 10, 1954 demanding judgment granting the relief prayed for in the complaint, and interveners-defendants Euphemia V. R. Wyatt as Administratirx c.t.a. of Christopher B. Wyatt, owner and holder of $9,000 of said Bonds, Elizabeth Beaudrias as Administratirx of Isidor J. Beaudrias, owner and holder of $20,000 of said Bonds, Martin J. Heller, owner and holder of $6,000 of said Bonds, Golden Gate Lodge, I.O.O.F. No. 204, owner and holder of $6000 of said Bonds, Fraternal Order of Eagles, Lodge No. 9, Sacramento owner and holder of $2,000 of said Bonds, and R. M. Smythe & Co., Inc. and Eunice H. Mertz, each the owner and holder of $1,000 of said Bonds, having intervened pursuant to order herein dated May 14, 1954, and

having appeared by their attorney Bernard Cowen, Esq. and having served their answer on May 17, 1954, demanding judgment granting the relief prayed for in the complaint, and intervener-defendants Taylor Pillsubry, Evan S. Pillsbury 2nd, Olivia Pillsbury Hearfield and Margaret Stallings, as sole distributees of Horace Davis Pillsbury, deceased, joint owners and holders of $100,000 of said Bonds having intervened pursuant to order herein dated June 29, 1954, and having appeared by their attorney, Bernard Cowen, Esq., and having served their answer on October 9, 1954, demanding judgment granting the relief sought in the complaint.

And due notice of the pendency of this action having been given on April 30, 1954, and on June 21, 1954, to the holders of said Bonds, other than those joined as parties herein, by mailing and by publishing in the New York Law Journal, the New York Journal-American and The Recorder, a newspaper published in San Francisco, California, notices of pendency in accordance with the terms of orders herein dated April 23, 1954, and June 9, 1954,

And by order herein dated June 9, 1954, Abraham J. Gellinoff, Esq., having been appointed to perform functions in the nature of those of a guardian ad litem in representing the viewpoint of holders of said Bonds who had received no distribution out of the fund in the hands of the defendant trustee and who had not been joined as parties to the action, and Eugene N. Nickerson, Esq., having been appointed to perform similar functions in representing the viewpoint of holders of said Bonds who had received less than seven distributions out of said fund and who had not been joined as parties to the action,

And plaintiff having moved for summary judgment by notice of motion dated December 13, 1954,

And during the pendency of plaintiff's said motion, the State of New York having moved by order to show cause

dated March 8, 1955, for an order permitting it to intervene herein, and upon the affidavits of Joseph J. Flynn, Esq., verified March 8, 1955 and March 24, 1955, the affidavit of Eugene N. Nickerson, Esq., verified March 9, 1955, and the affidavit of Abraham J. Gellinoff, Esq., verified March 11, 1955, submitted in support of the State's motion, the affidavit of William Eldred Jackson, Esq., verified March 14, 1955, and the affidavit of Robert M. Cowen, Esq., verified April 8, 1955, submitted in opposition to said motion, and the affidavit of William Eldred Jackson, Esq., verified April 11, 1955, withdrawing the opposition of the defendant trustee to said motion, and on the proposed answer of the State of New York containing a cross-claim against the defendant trustee, and on the proposed answer of the defendant trustee to said cross-claim, the Court by order herein dated May 20, 1955, having granted the motion of the State of New York for intervention and having reserved decision on plaintiff's motion for summary judgment so that it might be considered together with the claim of the State, and having granted the parties ten days for the submission of additional papers on the question whether the fund in the hands of the defendant trustee falls within the Abandoned Property Law of the State of New York,

Now, upon reading and filing the affidavit of Robert M. Cowen, Esq., verified December 23, 1954, and the exhibit thereto, submitted in support of plaintiff's said motion, the affidavit of William Eldred Jackson, Esq., verified January 12, 1955, submitted on behalf of the defendant trustee and neither in support or in opposition to said motion, the affidavit of Eugene N. Nickerson, Esq., verified February 23, 1955, and the affidavit of Abraham J. Gellinoff, Esq., verified March 1, 1955, submitted in opposition to said motion, and the affidavit of Joseph R. Thompson, verified May 27, 1955, submitted on behalf of the defendant

trustee and in opposition to the cross-claim of the State of New York that the fund held by the defendant trustee came or comes within the terms of the Abandoned Property Law of the State of New York, and upon the aforesaid pleadings of all parties, and the answer and cross-claim of intervener-defendant the State of New York served May 31, 1955, and the answer of the defendant trustee to said cross-claim served June 20, 1955, and after hearing Robert M. Cowen, Esq., attorney for plaintiff, and Bernard Cowen, Esq., attorney for the defendant and intervener bondholders, in support of said motion, and Jacob K. Javits, Attorney General of the State of New York, by Joseph H. Flynn, of counsel, attorney for intervener-defendant, State of New York, Eugene H. Nickerson, Esq., Special Guardian as aforesaid and Abraham J. Gellinoff, Esq., Special Guardian as aforesaid, in opposition to said motion, and Milbank, Tweed, Hope & Hadley, Esqs., by William Eldred Jackson, of counsel, attorneys for the defendant trustee, neither in support nor in opposition to said motion, but in opposition to said cross-claim of the State of New York, and due deliberation having been had, and the decision and opinion of the Court dated September 6, 1955 having been filed, and upon reading and filing the affidavits of Robert M. Cowen, Esq., verified November 2, 1955, Arthur A. Gammell, Esq., verified November 1, 1955, Joseph H. Thompson, Assistant Vice President of The Chase Manhattan Bank, verified November 1, 1955, Eugene H. Nickerson, Esq., verified November 1, 1955 and Abraham J. Gellinoff, Esq., verified November 9, 1955, in support of their respective applications for allowances herein, and the memorandum of the Court dated November 15, 1955 with respect thereto, on motion of Robert M. Cowen, Esq., attorney for plaintiff, it is

Appendix D.

ORDERED, ADJUDGED, DECREED and DECLARED:

1. That plaintiff's motion for a summary judgment as demanded in her complaint be and the same hereby is granted;

2. That this Court has jurisdiction over the parties and the subject matter of the action herein;

3. That plaintiff and the defendant-bondholders and the intervenor-defendant bondholders aligned in interest with the plaintiff, hold in the aggregate 95.363% of all the outstanding First Mortgage Five Percent Thirty-year Gold Bonds of the Western Pacific Railway Company due September 1, 1933; that notwithstanding all reasonable efforts made herein and over the period of 30 years last past, through publication and the mailing of notices by said defendant trustee to apprise them of their interest in the undistributed balance remaining of the original fund, the holders of 4.637% of said bonds are made up of persons who have neglected and failed to come forward to assert said interest; that their respective interests are and have been fairly represented by the guardians appointed herein to act in their behalf; that by reason of the foregoing, 100% of the holders of said $50,000,000 bonds of said Western Pacific Railway Company are adequately represented in this action as required by law as to cause a judgment rendered herein for the relief demanded in the complaint to be binding on all of them;

4. That the circumstances herein require a deviation and departure from the terms of Section 9 of Article 4 and Sections 13 and 15 of Article 5 of said agreement of September 1, 1903 made by and between the Western Pacific Railway Company and Bowling Green Trust Com-

pany as trustee and require defendant, The Chase Manhattan Bank as successor trustee under said agreement to deviate and depart from the terms thereof with respect to the fund of $21,649.65 held by said successor trustee and distributable to the holders of said bonds, by making distributions from said fund as hereinafter authorized and directed.

5. That the State of New York has no interest whatsoever in said fund of $21,649.65 and its cross-claim against the defendant, Chase National Bank of the City of New York, be and the same hereby is dismissed with prejudice;

6. That The Chase Manhattan Bank as successor trustee under said agreement of September 1, 1903 be and it hereby is authorized and directed to forthwith distribute and pay out of said fund of $21,649.65 the following sums as allowances herein:

a. To Robert M. Cowen, attorney for plaintiff, the sum of $1,500.00 together with plaintiff's costs and disbursements herein fixed and allowed in the sum of $200.75, making a total of the sum of $1,700.75;

b. To Milbank, Tweed, Hope & Hadley, Esqs., attorneys for defendant trustee, The Chase Manhattan Bank, the sum of $1,250.00;

c. To The defendant trustee, The Chase Manhattan Bank, the sum of $500.00 together with its disbursements herein fixed and allowed in the sum of $71.66, making a total of the sum of $571.66;

d. To Eugene M. Nickerson, appointed herein to perform services in the nature of a guardian ad litem for bondholders who received less than seven distributions out of the original fund herein, the sum of $750.00; and

e. To Abraham J. Gellinoff, appointed herein to perform services in the nature of a guardian ad litem for bondholders who did not participate in any distribution out of said fund, the sum of $750.00.

7. That after payment of said allowances, The Chase Manhattan Bank as successor trustee under said agreement of September 1, 1903 be and it hereby is authorized and directed to pay out forthwith the $16,627.24 balance of said fund of $21,647.65 exclusively to the plaintiff and to the defendant—and intervenor defendant bondholders herein and hereinafter named who, pursuant to the summons and the notices herein, came forward as record holders of duly numbered Western Pacific Railway Company First Mortgage 5% Thirty-year Gold Bonds due September 1, 1903, who had not received payment of their claims on their bonds in full in the course of distributions heretofore made, to participate according to their respective fractional shares, in the distribution of said fund of $21,649.65, as follows:

Appendix D.

lers of Duly Numbered Bonds of Record	*Principal Amounts of Bonds Held*	*Amounts to Them Adjudged Payable*
stern Pacific Railway Corporation lexis I. duPont as Receiver	$47,451,500.00	$16,546.81
e Mayer as Administratrix of enjamin Mayer, dec'd	5,000.00	1.75
ls Fargo Bank & Union Trust ompany and Helene N. Prais as rustee under the will of Sanford achs, dec'd	30,000.00	10.50
n M. Wilmans as Executor of Lil-an Wilmans, dec'd	5,500.00	1.75
V. Korbel	15,000.00	5.25
k of America National Trust & avings Association	30,000.00	10.50
hemia V. S. Wyatt as Adminis-ratrix c.t.a. of Christopher B. Vyatt, dec'd	9,000.00	3.15
ternal Order of Eagles, Lodge o. 9 Sacramento	2,000.00	.70
den Gate Lodge, No. 204, I.O.O.F	6,000.00	2.10
rtin J. Heller	6,000.00	2.10
abeth J. Beaudrias as Adminis-ratrix of Isidore J. Beaudrias, e'd	20,000.00	7.00
M. Smythe & Co., Inc.	1,000.00	.35
ior Pillsbury, Evan S. Pillsbury, d. Olivia Pillsbury Hoerfield and largaret Stallings as sole distribu-es of Horace Davis Pillsbury, e'd	100,000.00	34.93
ice M. Merts	1,000.00	.35
	$47,681,500	$16,627.24

8. That jurisdiction of the Court over the parties and the subject matter of the action herein be and it hereby is reserved pending further proceedings herein and until said fund of $21,649.65 has been disbursed in its entirety.

SYLVESTER J. RYAN,
United States District Judge.

Dated, New York, N. Y.
November 21st, 1955.

APPENDIX E

Cases of equity receiverships in the federal courts wherein orders were made *a.*) for the withdrawal from the United States Treasury under 28 U. S. C. 2042 of long unclaimed dividends, which had arisen out of the proceeds of foreclosure sales and had been paid into Court, or which had remained under the control of said federal courts, and *b.*) for their distribution to appearing bondholders who established that their claims as proved had not been paid in full, all in consonance with the principles of equity approved and acted upon in *Louisville & Nashville RR Co.* v. *Robin*, 135 Fed 2d 704, 5th Cir, May 6, 1943.

U. S. District Court—Southern District of New York:

Central Hanover B. & T. Co. v. *Ulster & Delaware RR Co.* (Eq. 61-329) Order of August 27, 1949, (Coxe, D. J.);

Manufacturers Trust Co. v. *U. S. Mex. Oil Corp'n* (Eq. 27-121) Order of March 9, 1949 (Coxe, D. J.);

National Commercial Bank & Trust Co. v. *Hudson Navigation Co.* (Eq. 22-241) Order of August 24, 1951 (Murphy, D. J.);

American Trust Co. v. *Hudson Valley Portland Cement Co.* (Eq. 29-134) Order of Dec. 12, 1949 (Noonan, D. J.);

North River Coal & Wharf Co. v. *McWilliams Bros. Inc.* (Eq. 40-20) Order of Dec. 1, 1950 (McGohey, D. J.);

Farmers Loan & Trust Co. v. *Mina Grande Cons M & M Co.* (Eq. 24-13) Order of April 11, 1951 (Ryan, D. J.);

New York Trust Co. v. *Canadian Venezuelan Oil Co., Ltd.* (Eq. 12-266) Order of June 27, 1950 (McGohey, D. J.);

Appendix E.

Taylor v. *Delaware & Eastern RR Co.* (Eq. 7-122) Order of March 11, 1953, (Edelstein, D. J.);

U. S. District Court—District of Kansas:

United States & Mexican Trust Co., v. *Kansas City, Mexico & Orient Ry Co.* (Equity No. 1202) Order of Dec. 17, 1952 (Hill, D. J.);

U. S. District Court—District of Utah:

James H. Ham as Trustee v. *Oregon Short Line & Northern Ry. Co.* (Eq. 2) Order of Jan. 25, 1954 (Ritter, D. J.);

U. S. District Court—N. D. of California:

Equitable Trust Co. of N. Y. v. *Western Pacific Ry. Co.* (Eq. 169) Order of Dec. 22, 1953 (Harris, D. J.);

(Note—This concerned an unclaimed $15,502.84 balance in the U. S. Treasury. In *Drascovich* v. *Equitable Trust Co. of New York as Trustee* 3 Fed 2d 724 (1922) the Court of Appeals for the 9th Circuit indicated it would not follow *American Loan & Trust Co.* v. *Grand River,* 159 Fed 775 because the distribution of that part of the fund which represented the unclaimed dividends was not in issue; that as to the interest on that part of the fund, the same should be held for the non-appearing bondholders for the time being; that in the distant and remote future the principle expressed in *American Loan & Trust Co.* v. *Grand River, supra* might be appropriate to the situation. And so it was held by Harris, D. J. in his order of December 22, 1953, when the distribution had become appropriate.)

APPENDIX F

OPINION OF STATE COURT—*Moscowitz* v. *Briskman*

February 17, 1950

N. Y. LAW JOURNAL

SUPREME COURT, NEW YORK CITY—No. 30,826 OF 1946

By Mr. Justice BOTEIN:

Moscovitz v. *Briskman*—Under the terms of the trust indenture, the substituted trustee held the mortgage in trust "for the equal and proportionate benefit and security of all present and future holders of said bonds and coupons without preference * * *"

Under the trust indenture, the funds presently in the possession of the substituted trustee are therefore trust funds for the benefit of bondholders (*Rogers Locomotive, &c., Works* v. *Kelly*, 88 N. Y. 234; *Brown* v. *Morgan & Co. Inc.*, 265 App. Div. 631, affd w.o. 295 N. Y. 867; *Schneider* v. *Nat. City Bank*, 180 Misc., 426).

The terms of the indenture create in each bond, as held by each individual bondholder, an equitable right to the pro rata distribution of the fund, according to the denomination of the bond. This right does not attach to all of the bonds collectively, nor may it be asserted by all of the bondholders collectively or as a class (*Drascovich* v. *Equitable Trust Co. of N. Y.*, 3 Fed. 2d 724).

The funds in the hands of the substituted trustee are therefore not common funds payable to a class, but under the terms of the trust indenture, belong to all of the bondholders severally in proportion to their holdings (*Brown* v. *Penn. Canal Co.*, 274 Fed. 467, aff'd 279 Fed. 417).

The plaintiffs rely upon *Louisville & N. RR Co.* v. *Robin* (135 Fed. 2d 704). This case can be distinguished upon the facts.

Appendix F.

The other cases cited by the plaintiffs are either not authority for the relief sought herein, or are bankruptcy matters and not controlling herein. The Bankruptcy Act provides specifically for the fixing of a bar date for the filing of claims and for the making of a subsequent secondary distribution of unclaimed moneys. Accordingly, the relief sought in Paragraph VI of the complaint is denied.

The plaintiffs are directed to submit a judgment in accordance with the foregoing, which shall also contain a provision directing the trustee or his disbursing agent to pay into court, by depositing with the city treasurer, for the benefit of the bondholders who have not theretofore appeared, all moneys remaining unclaimed at the expiration of one year after the entry of said judgment.

APPENDIX G

OPINION OF STATE COURT—*In re Continental Bank & Trust Co.*

(MIDTOWN ENTERPRISES) NEW YORK COUNTY—No. 12961 OF 1952.

N. Y. LAW JOURNAL, JULY 21, 1954

By Mr. Justice RABIN.

The excellent report of the learned referee is approved and confirmed. As regards the other relief requested in the notice of motion, the Court directs that the fund now in the hands of the trustee, wherein no claimants have been located, shall be deposited after deductions hereinafter set forth with the Treasurer of the City of New York to be held for the owners of the bonds and stock as such owners appear on the books of the trustee, either by specific name or otherwise. * * *

(Report of referee follows opinion in *Moscowitz* v. *Briskman, supra*).

APPENDIX H

Agreement of Settlement Under Which the Funds in the Hands of Irving Moscowitz as Trustee Came Into His Possession.

THIS AGREEMENT, made the 2nd day of July, 1946, between Irving Moskovitz, as substitute Trustee (hereinafter called the Trustee) under an Indenture (hereinafter called the Indenture) dated as of January 1, 1926 between Park Avenue Leasing Corporation and Rollin J. Francis, as Trustee, having his office at 39 Broadway, New York, N. Y.; Fifty-Eighth Street & Sixth Avenue Corporation (hereinafter called the Corporation), a corporation organized and existing under the laws of the State of New York, having its principal office at 39 Broadway, New York, N. Y. (the Trustee and the Corporation being hereinafter called the Sellers); Windsor Operating Corporation, a corporation organized under the laws of the State of New York, having its principal office at 4 Park Avenue, New York, N. Y. (hereinafter called the Purchaser); and Endicott Operating Corp., a corporation organized and existing under the laws of the State of New York, having its principal office at 4 Park Avenue, New York, N. Y. (hereinafter called Endicott),

WITNESSETH THAT:

1. The Sellers agree to sell and convey and the Purchaser agrees to purchase:

(a) All of the right, title, and interest of the Sellers in and to the leasehold estate created under and by virtue of the indenture of lease (hereinafter called the Lease) dated August 31, 1933 between Egdon Realty Corporation and the Corporation covering the land and the buildings and improvements erected thereon situated on the southwest corner of 58th Street and Sixth Avenue, Borough of Manhattan, City, County and State of New York (hereinafter called the Premises);

(b) All of the right, title and interest of the Sellers in and to all fixtures and articles of personal property owned by the Sellers appurtenant to or used in connection with the operation of the Premises, all of which are included in this sale;

(c) All of the interest of the Sellers in and to any pending proceedings or claims for the reduction of real estate taxes assessed against the Premises or for the reduction of any assessment against the Premises by reason of the removal of the Sixth Avenue elevated structure;

for a consideration consisting of the aggregate of the following:

(1) The sum of $125,000, to be paid by the Purchaser to the Sellers in cash or good certified check drawn on a bank whose principal office is situated in The City of New York, upon delivery of the assignment of the Lease as hereinafter provided;

(2) The surrender to Sellers of $788,700 in principal amount of Park Avenue Leasing Corporation 6½% First Mortgage Leasehold Gold Bonds and/or Certificates of Deposit therefor, being all of such Bonds and/or Certificates of Deposit now owned or held by Endicott; and

(3) The waiver by Endicott of any and all claim, by reason of the ownership of such Bonds or Certificates of Deposit, to any moneys now or hereafter held by or for, or due to, the Sellers.

* * *

2. It is understood that the Sellers intend, and they hereby agree, to institute appropriate proceedings in the Supreme Court, New York County (hereinafter called the Court), seeking an appropriate order or judgment approving this agreement and authorizing and empowering the Sellers to carry out the same. In the event that Sellers shall fail, on or before the 20th day of September,

1946, to obtain an appropriate order or judgment of the Court approving this agreement and authorizing and empowering the Sellers to carry out the same, then and in such event this agreement shall become null and void and shall have no further force or effect. It is expressly understood and agreed that time is of the essence of this paragraph.

* * *

In Witness Whereof the parties hereto have signed and sealed this agreement the day and year first above written.

Irving Moskovitz
(Irving Moskovitz) as Substituted Trustee as aforesaid

Fifty-Eighth Street & Sixth Avenue Corporation
by Irving Moskovitz,
President

Attest:

Henry J. Goldschmidt, Asst.-Secy.

[Seal]

Windsor Operating Corporation
By E. J. Carrol
President

Attest:

F. T. Whebby, Secy.

[Seal]

Endicott Operating Corp.
By E. J. Carrol
President

Attest:

F. T. Whebby, Secy.

[Seal]

APPENDIX I

The Case of *Moscowitz* v. *Briskman* as Described in the Papers Filed in the Office of the Clerk of New York County, No. 30,826 of 1946.

The Park Avenue Leasing Corporation, having acquired a leasehold of the premises at the southwest corner of Sixth Avenue and 58th Street, executed on February 8, 1926 and delivered to Rollin J. Francis as Trustee an indenture of mortgage covering said leasehold to secure the payment of principal and interest on $1,100,000 of its First Mortgage 6½% Leasehold Gold Bonds. On January 1, 1929 there was a default and payment of both principal and interest matured on that day. On July 5, 1940, Irving Moskowitz was designated Substitute Trustee in the place of Rollin J. Francis.

On July 2, 1946, a settlement agreement was entered into wherein Irving Moscowitz as Trustee and the Windsor Operating Corporation were the principal parties. The agreement called for the Trustee's sale of all of his right, title and interest in the leasehold and in all fixtures and personal property appurtenant thereto for $125,000 in cash and the surrender of $787,700 of said bonds for cancellation.

By its order of March 10, 1947, the Supreme Court of New York County approved the agreement and made it binding on all of the bondholders. Among other things, it decreed that the agreement was in the best interest of all concerned and constituted a bona fide settlement of all claims and controversies that had been or might be asserted by said Trustee and by the owners and holders of said bonds. The agreement as approved and carried out would not only satisfy and cancel the mortgage lien but would also serve to satisfy the debt due by the Leasing Corporation on the bonds in the possession and ownership of the respective bondholders.

By its order of March 4, 1948, the Court directed the appointment of the New York Trust Company as the

Trustee's disbursing agent. The Trustee was required to turn over to the Trust Company, out of the funds which came into his hands following his receipt from the purchaser of the leasehold of the purchase price, sufficient sums to pay a dividend of 20% on the remaining $311,300 of Leasehold Bonds. Payment to each bondholder of said 20% dividend was to be made upon the bondholder's surrender of his bond for cancellation. The order provided that there might be a further dividend in the event that of the moneys left in the hands of the Trustee, there remained any sum to be turned over to the Trust Company after the expenses of administration as allowed by the Court shall have first been paid.

Thereafter the Trustee filed his first and final account and upon his petition and complaint, the entry of a final judgment was sought. The plaintiff Trustee, in Paragraph VI of his demands for judgment, having asked for judgment

> "Authorizing and directing the plaintiff Trustee to make a secondary distribution upon a date to be fixed by the Court in the final judgment herein, pro rata and subject to proper expenses and disbursements, among the then known owners and holders of Bonds of any and all moneys distributable to owners and holders of Bonds which on said date shall have been unclaimed and distributed.",

the Court, in its opinion of February 17, 1950, gave its view, on the relationship of the Trustee to the beneficiaries of the trust in the distribution of the monies on hand.

In the judgment of March 7, 1950, it was ordered that such monies as had come into the hands of the Trust Company as disbursing agent and happened to remain undistributed for one year after the date of entry of the judgment, should be paid into Court by the depositing of the same with the Treasurer of the City of New York (Civil Practice Act, Sec. 134).

APPENDIX J

Affidavit of Trustee Chase National Bank, to Show That Fund on Hand Had Never Been Allocated to or Set Apart for any Particular Western Pacific Ry. Co. Bonds That Were to Be Presented for Payment and Stamping.

JOSEPH R. THOMPSON, being duly sworn, says:

I am an Assistant Vice President of The Chase Manhattan Bank, successor by merger to defendant The Chase National Bank of the City of New York as trustee under the Western Pacific Railway Company Mortgage dated September 1, 1903 (hereinafter called "defendant trustee"). I make this affidavit pursuant to the order of the Court herein dated May 20, 1955, and in opposition to the claim of the Attorney General of the State of New York that the fund held by the defendant trustee came or comes within the terms of the Abandoned Property Law of the State of New York.

The fund here involved consists of the unclaimed balance of seven distributions to bondholders, the first made available in 1918 and the seventh in 1925. The sums made available for distribution were the proceeds of the recovery against the guarantor on the bonds. The judgment granting such recovery (U. S. C. C. A. 2nd Cir. Records & Briefs, 250 Fed. 327, Vol. 7, p. 1381), contained no provision determining the right of any bondholder to share in the proceeds and merely adjudged that the trustee recover from the guarantor for the amount due.

From November of 1948 until the aforementioned merger on March 31, 1955, I was in charge of the Corporate Securities Division of the defendant trustee, which Division of the defendant trustee had charge of the fund here involved. In that capacity I was familiar with the

records of said Division relating to said fund, which show the amounts made available in each of the seven distributions, the amounts paid out of each distribution in each year since its commencement, and the amounts remaining of each distribution.

I have agan recently examined said records, and the following statements are based thereon.

No amount in any of the seven distributions has been segregated or earmarked by any of the trustees acting from time to time as belonging to or allocated to or set apart for any particular bond or bonds to be presented. The practice of such trustees has been that whenever any $1,000 bond is presented, with the coupons maturing on or after March 1, 1915, or in the case of any missing coupon or coupons, with an indemnity bond, 1/50,000 of each distribution in which the bond has not previously shared is paid to the holder of the bond and the amount paid is stamped on the bond, and the corresponding appropriate fraction in the case of each $100 bond. (The issue consisted of $50,000,000 in aggregate principal amount of bonds having denominations of $1,000 and $100 each).

* * * *

(Verified May 27, 1955.)

FILED
AUG 18 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 282

ROSA MAYER, as Administratrix of Benjamin Mayer,
Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,
Intervening Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACOB K. JAVITS
Attorney General of the State
of New York
Attorney for Intervening
Defendant-Respondent
80 Centre Street
New York 13, New York

JAMES O. MOORE, JR.
Solicitor General
RUTH KESSLER TOCH
DANIEL M. COHEN
Assistant Attorneys General
Of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Subject Index.

	PAGE
Statement of the Case	2
The Facts	2
The Action; the Decision of the District Court	2
The Court of Appeals Decision	3
Argument	4
Point I—The jurisdiction of the Federal courts in this action being based upon diversity of citizenship, the Court of Appeals properly, under the principle and policy laid down by this Court, applied the law of the State of New York. The New York decisions, in which the law of the State on the issue involved in the action has been declared, were correctly accepted as authoritative, the aspects which petitioner criticizes having no diminishing effect thereon	4
Conclusion	7
Appendix—Excerpts from Opinion of Referee, July 21, 1954	9

Cases Cited.

Drascovich v. *Equitable Trust Co. of N. Y.*, 3 F. (2d) 724	7
Erie R. Co. v. *Tompkins*, 304 U. S. 64	4, 5
Guaranty Trust Co. v. *York*, 326 U. S. 99	5
Guaranty Trust Co. v. *York*, 326 U. S. 99	5
In Re Continental Bank & Trust Co., N. Y. L. J., 7/21/54	9
In Re Continental Bank & Trust Co., Referee's Opinion (Appendix F)	6, 8
Louisville & Nashville R. R. Co. v. *Robin*, 135 F. (2d) 704	8
Moskowitz v. *Briskman*, N. Y. L. J., 2/17/50, aff'd, 278 App. Div. 761	6, 8
Six Companies v. *Highway Dist.*, 311 U. S. 180	5
Stoner v. *New York Life Ins. Co.*, 311 U. S. 464	5
West v. *A. T. & T. Co.*, 311 U. S. 223	5, 6

Supreme Court of the United States

October Term, 1956

No.

ROSA MAYER, as Administratrix of Benjamin Mayer,
Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,
Intervening Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the intervening defendant-respondent, The People of the State of New York, by its counsel of record, and opposes the petition herein and asks that the same be denied.

Statement of the Case

Petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (p. 5a, Appendix B to Petition)*.

That judgment reversed a judgment of the District Court for the Southern District of New York, which had permitted the Chase National Bank of the City of New York, as Trustee of a trust created by a trust agreement, to deviate from the terms of the agreement with respect to the distribution of certain moneys remaining in its hands unclaimed and which had directed the distribution of such moneys to the plaintiff and other known bondholders pro rata.

The Court of Appeals, reversing the District Court, remanded the action for consideration of the claim of the State of New York that the fund became abandoned property under Section 300(1)(a)(v) of the New York Abandoned Property Law.

The Facts

The Action; the Decision of the District Court

The suit is in the Federal courts by reason of diversity of citizenship, plaintiff being a citizen of the State of Maryland, and defendant Trustee a New York Corporation.

The action is for a declaratory judgment and instructions to the Trustee under a trust agreement securing bonds issued by the Western Pacific Railway Company, as

*In appendices to the petition for certiorari, are printed the judgments and opinions of the courts below in the instant case. References in this brief to these judgments and opinions will be made to them at the pages of such appendices.

to the distribution of a fund held by the Trustee in the amount of $21,893.15. The fund is the unclaimed balance of distributions to bondholders from proceeds of a money judgment recovered by the Trustee against the guarantor of the bonds. The rightful bondholders, to whom this balance would go, are unknown. The fund is not now and never has been in the custody of the Court. The District Court directed that the fund be distributed to plaintiff and other known bondholders according to their pro-rata share, after payment of necessary costs incident to the present suit. This was a deviation from the terms of the trust agreement.

The Attorney General of New York intervened on behalf of The People of the State of New York, contending that the unclaimed moneys were abandoned property under Section 300 of the Abandoned Property Law of the State of New York.

The Court of Appeals Decision

The Court of Appeals reversed the District Court.

It held:

> Since plaintiff and other known bondholders had already received their full pro-rata share of the moneys, they are not entitled by the terms of the trust to any further participation in the fund (p. 2a).
>
> This being a case where Federal jurisdiction rests on diversity of citizenship, it must be decided in accordance with New York law, and the law of New York bars further distribution to known bondholders (pp. 2a-3a).
>
> Since the fund should not be turned over to the known bondholders, the cross-claim of the State of New York for the fund as abandoned property should be considered by the District Court on remand (p. 4a).

ARGUMENT

POINT I

The jurisdiction of the Federal courts in this action being based upon diversity of citizenship, the Court of Appeals properly, under the principle and policy laid down by this Court, applied the law of the State of New York. The New York decisions, in which the law of the State on the issue involved in the action has been declared, were correctly accepted as authoritative, the aspects which petitioner criticizes having no diminishing effect thereon.

This action, in which the Federal court's jurisdiction rests upon diversity of citizenship, relates to the rights of bondholders under an express trust agreement (Op. of Court of Appeals, p. 4a, Appendix A). Such being the case, the State law on the issue involved in the action is to be applied by the Federal courts. The question, therefore, upon this petition is whether petitioner raises such a question in respect to the propriety of the Court of Appeals applying the law of New York as declared in two decisions of the courts of New York, as to warrant this Court's granting the petition. Petitioner objects to the Court of Appeals following the New York decisions because they were rendered by the Supreme Court of the State, which is not the State's highest court, were not published in the Reports and their context did not, on the face, set forth the facts as fully as petitioner would have them.

Since *Erie R. Co.* v. *Tompkins* (304 U. S. 64), it is established law that where the jurisdiction of the Federal court in a case rests upon diversity of citizenship, the question before the court is to be decided in accordance with the law of the State. *Erie R. Co.* v. *Tompkins* "ex-

pressed a policy that touches vitally the proper distribution of judicial power between State and federal courts" (*Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109). As Mr. Justice Frankfurter, in the latter case, explained the policy:

> "In essence, the intent of that decision [*Erie R. Co.* v. *Tompkins*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." (*ibid.*)

From this, it flows that the law of the State, whether enunciated by its highest court or by a court below that level, is to be followed by the Federal court. And so this Court holds. Petitioner's argument here—that the Court of Appeals should not have followed the law of the State of New York because the pertinent cases had been decided by the Supreme Court of the State, which is not the State's highest court—is counter to what this Court holds as natural corollary to the principle of *Erie R. Co.* v. *Tompkins;* i. e., that the Federal courts are to accept State law as enunciated by the State courts other than a State's highest court:

> *Fidelity Trust Co.* v. *Field*, 311 U. S. 169;
> *Six Companies* v. *Highway Dist.*, 311 U. S. 180;
> *West* v. *A. T. & T. Co.*, 311 U. S. 223;
> *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464.

The theory of why this Court holds State court decisions binding upon the Federal courts, although not ren-

dered by the State's highest court, is set forth in these cases. From the opinions of Chief Justice Hughes, Justice Stone and Justice Murphy, this theory can be summed up to be this: "A state is not without law save as its highest court has declared it." (*West* v. *A. T. & T. Co.*, 311 U. S. 223, 236). There are many rules of decision which are the laws of the State, although the highest court has never passed upon them. A Federal court is "not free to reject the state rule" merely because it has not been enunciated by the State's highest court. It is not for a Federal court to, in effect, overrule a decision of a State court. Until the highest State court has done that, the law of the State, as decided by courts of lower levels, is to be followed by the Federal court.

There are two decisions in New York State which have declared the law on the issue in this case. Were there but one, the Federal court would, of course, be required to follow it. One New York case on the subject was decided nearly seven years ago and there has been no decision since then differing with it. On the contrary, it has been followed within the State as the law on the subject. The decision is *Moskovitz* v. *Briskman* (p. 26a, Appendix F). It is a decision of the State Supreme Court, which is the highest court of first instance in the State. The Justice who decided it has since been designated to the State's intermediate appellate court, the Appellate Division. His decision was unanimously affirmed by the Appellate Division, without opinion (278 N. Y. App. Div. 761). A case in which the *Briskman* case was followed is *In Re Continental Bank & Trust Co.* (p. 28a, Appendix B). That, too, is a decision of the New York State Supreme Court and the Justice who decided that case, affirming the report of the Referee, has also been designated to the Appellate Division. Parts of the Referee's opinion are printed as an appendix to this brief.

As to petitioner's dwelling upon the fact that the decisions of the Supreme Court in these cases are not reported, the situation is that in New York State decisions of courts below the appellate courts are not automatically published in the Reports, and relatively few opinions of the State Supreme Court are published in the Reports. The point need not be labored that with full opinions or not, reported or not, the decisions which the Court of Appeals followed are the adjudications laying down the law of New York State on the issue and those cases were indistinguishable from the case at bar (p. 3a, Appendix A).

Conclusion

There is nothing in this case that would make it one for review by this Court.

Actually, there is here involved something less than $17,000, virtually all of which would go to one railway corporation, and the remaining $80 would go to some dozen bondholders, in amounts ranging from 35 cents to $10.50. The other $5,000 of the $21,649 fund would be absorbed in attorneys' fees and in costs.

In fact, this trust agreement, under which the bonds involved in this action were issued, was construed in 1925 in *Drascovich* v. *Equitable Trust Co. of N. Y.*, 3 F. (2d) 724, 9 Cir., to require payments to be made severally to bondholders in proportion to their holdings. The *Drascovich* case rejected the contention that the proceeds of the foreclosure of the trust mortgage constituted an "undistributed common fund"; and also rejected the claim that the pro-rata share of absent bondholders could be invaded on behalf of other bondholders (*cf.* District Court Op., Appendix C, p. 9a). (When, in 1953, the District Court in California ordered the balance of the fund

there distributed to bondholders pro rata, it was upon an order obtained on default [Record filed in Court of Appeals, pp. 107-108].)

As to the question of the application by the Court of Appeals of the decisions of the New York State Supreme Court, that question is already definitively settled by this Court. The Federal case to which petitioner points as inconsistent with the decision of the Court of Appeals in the present case, *Louisville & Nashville R. R. Co.* v. *Robin*, 135 F. (2d) 704, was cited to and considered by the New York State Supreme Court in *Moskoritz* v. *Briskman* and *In Re Continental Bank & Trust Co.* and found to be factually distinguishable from the situations in those cases, to which the present case is akin (Op. of Court of Appeals, p. 3a, Appendix A).

THE WRIT OF CERTIORARI PETITIONED FOR HERE SHOULD BE DENIED.

Dated: August 10, 1956.

Respectfully submitted,

JACOB K. JAVITS
Attorney General of the State
of New York
Attorney for Intervening
Defendant-Respondent
80 Centre Street
New York 13, New York

JAMES O. MOORE, JR.
Solicitor General

RUTH KESSLER TOCH
DANIEL M. COHEN
Assistant Attorneys General

Of Counsel

Appendix

In Re Continental Bank & Trust Co.
Excerpts From
Opinion of Referee
May 6, 1954

Affirmed, Supreme Court, Mr. Justice Rabin
July 21, 1954

"A bondholder, Ethel Lichtentag, argues that such unclaimed funds less expenses and fees belong to the Midtown bondholders of record who have been located and that a secondary distribution should be made to them on the authority of *Louisville & Nashville R. R. Co.* v. *Robin*, (135 Fed. 2d 704).

"The Attorney General of the State of New York, who was asked to intervene at the Referee's request after claims had been asserted to the fund by the stockholders and bondholders, contends that such money should be paid to the State Comptroller as abandoned property on the theory of *bona vacantia*. Alternatively, he has requested that the sum be paid over to the State Comptroller pursuant to Section 1310 of the *Abandoned Property Law*, which reads as follows:

> 'Any person who holds property belonging to any other person, which property has remained unclaimed for a period of six years by the person or persons appearing to be entitled to receive such property, may apply to the supreme court upon fifteen days' notice to the state comptroller for an order declaring such property to be abandoned and directing the payment of such property to the state comptroller, if the comptroller shall elect to receive the same. Upon payment of such property to the state comptroller pursuant to such order, the former holder of the property shall be relieved of any and all liability in connection therewith.'

* * *

"A trust does not become a prize by lapse of time or operation of law.

* * *

"The funds in the possession of the Trustee are trust funds for the benefit of the individual bondholders. (*Moskoritz* v. *Briskman*, Opinion of Judge Botein, N. Y. L. J., February 17, 1950, aff'd without opinion, 278 A. D. 761; *Rogers Locomotive &c. Works* v. *Kelly*, 88 N. Y. 234; *Brown* v. *Morgan Co., Inc.*, 265 App. Div. 631, aff'd without opinion, 295 N. Y. 867; *Schneider* v. *Nat. City Bank*, 180 Misc. 426).

* * *

"Since the Indenture created in each bond a right to a pro rata distribution of the fund, such a right does not attach to the bonds as a class any more than it does to its stock as a class. Nor are the unclaimed moneys common funds payable to a class. They belong to all the bondholders severally in proportion to their holdings. (*Moskoritz* v. *Briskman, supra; Drascovich* v. *Equitable Trust Co. of New York*, C. A. 9th Cir., 1925, 3 Fed. 2d 724; *Brown* v. *Pennsylvania Canal Co.*, 274 Fed. 467, aff'd 279 Fed. 419; *In re Colonial Trust Company*, Memorandum by Judge Rabin, N. Y. L. J., March 5, 1954.)

"The provisions of the Indenture in the case at bar precluded any transfer of this money to other bondholders. This right is part of the contract with the bondholders: the Trustee has a special relationship of trust with each bondholder, known or unknown, in respect to the sum so allocated. The money belonged to them severally, and the improbability of locating them does not authorize the taking of the funds of one bondholder by another. (*Guaranty Trust Co. of N. Y.* v. *Newark & Hackensack Traction Co.*, 136 N. J. Equity 159).

"Various cases have been cited under the federal Bankruptcy Act (Sec. 66B U. S. C. A., Sec. 106(b)) where distribution of unclaimed dividends has been made to creditors not paid in full. It is also argued that the Debtor & Creditor Law (Sec. 160, 198) provides for such distribution. But the judicial function is to construe the law not construct it and in the absence of statutory authority applicable to the particular case, legal and equitable principles must govern. Those principles preclude a secondary distribution to bondholders.

"*Louisville & Nashville R. R. Co.* v. *Robin* (*supra*) is inapplicable here. In that case funds lay dormant for 63 years. The court's choice lay between holding that the fund should go to the federal government or to the known bondholders. Relying on *American Loan & Trust Co.* v. *Grand Rivers Co.*, (159 Fed. 775) which had held that the United States is not entitled to ownerless property and that 'if any government can claim to be *parens patriae*, it is that of the state, and not of the nation,' the court held that the funds should go to the remaining bondholders as a class.

"But the bondholders here are several not a class, the terms of the Indenture preclude such distribution, the funds can hardly be considered abandoned, and if and when they are the state is a very real claimant as a sovereign and custodian—in contrast to the dubious claim of the federal government in the *Robin* and *Grand Rivers* cases."

Office - Supreme Court, U. S.
FILED
AUG 23 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 282

ROSA MAYER, as Administratrix of Benjamin Mayer,
Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, ET AL.,
Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,
Intervening Defendant-Respondent.

PETITIONER'S REPLY BRIEF

EDWARD F. UNGER,
Attorney for Petitioner,
200 Fifth Avenue,
New York, N. Y.

ROBERT M. COWEN,
BERNARD COWEN,
Of Counsel.

INDEX

Cases Cited

PAGE

Brown v. Pennsylvania Canal Co., 235 Fed. 269, 247 Fed. 467, 279 Fed. 417, 3rd Cir. 3

Erie R. R. v. Tompkins, 304 U. S. 64 ..... 4, 6

Fidelity Union Trust Co. v. Fields, 311 U. S. 169 4

Re Fielding, 96 Fed. 800 2

Re Gubelman, 79 Fed. 2d 976, 2d Cir. 3

Re Interborough Consolidated Corp., 206 Fed. 2d 30, 2d Cir. 3

Louisville & Nashville R. R. v. Robin, 135 Fed. 2d 704, 5th Cir. 3, 4, 5

Re Paramount Publix Corp., 72 Fed. 2d 219, 2d Cir. 2

Re Searles, 166 Fed. 2d 475, 2d Cir. 2

Re Vulcan & Reiter, Inc., 162 Fed. 2d 94, 2d Cir. 3, 5

West v. A. T. & T. Co., 311 U. S. 223 4

Supreme Court of the United States

OCTOBER TERM, 1956

No. 282

ROSA MAYER, as Administratrix of Benjamin Mayer,

Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, ET AL.,

Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervening Defendant-Respondent.

PETITIONER'S REPLY BRIEF

Petitioner is replying to Respondent's brief because Respondent would have this Court ignore well established truths and have it appear that Petitioner is relying on technicalities to obtain the relief she seeks.

Among the established truths are the following:

1. That when the Congress recognized the urgent need for the exercise of federal jurisdiction over an insolvent's

properties in the liquidation thereof for the benefit of creditors throughout the land, it created Courts of Bankruptcy. In the course of the latter's administration of the affairs of insolvents, certain principles of equity were evolved which became applicable when federal courts undertook similar tasks in what has been described as equity receiverships. In both cases, creditors, secured and unsecured, were required to prove their claims as creditors before they could hope to share in the assets which had come to hand. Where bondholders were concerned, they were required to prove their claims as in the case of any other creditor. Where a bondholder omitted to do so, the Trustee under the mortgage indenture could act under its proved claim for a deficiency to preserve the bondholder's interests (*Re Paramount Publix Corp.*, 72 Fed. 2d 219 2d Cir.). Before the bondholder could collect his share from the mortgage trustee, he was nevertheless required to produce his bond as proof of his claim against the insolvent. Therefore, it was not because he happened to be the beneficiary of a trust but because he was a proved creditor of the insolvent that he shared in the insolvent's estate.

2. When dividends payable to creditors, secured or unsecured, remained unclaimed and were paid into court, with no authority in the Clerk as statutory trustee of the fund, to distribute the same, Sec. 66 was incorporated into the Bankruptcy Act of 1898 to permit the Court to further administer the unclaimed dividends and distribute the same among those proved creditors whose claims still remained to be paid in full (See *Re Searles*, 166 Fed. 2d 475, 2d Cir. and *Re Fielding*, 96 Fed. 800 cited therein). Subsequently 28 U. S. C. 2042 was enacted to enable a federal court of equity to determine the claims of such persons as sought the distribution of the moneys on deposit as aforesaid.

Altho no legislation was enacted to embrace unclaimed dividends arising out of equity receiverships, federal courts, in the exercise of their equity powers, not only indicated their approval of the equitable principles embraced in Sec. 66b of the Bankruptcy Act, but applied them to the unclaimed dividends on hand. (See *Louisville & Nashville R. R.* v. *Robin*, 135 Fed. 2d 704, 5th Cir. and the cases enumerated in Petitioner's Appx. E, p. 24a, and the reference to the $7000 unclaimed fund in *Re Interborough Consolidated Corp.*, 206 Fed. 2d 30, 2d Cir., which arose out of a Mortgage Trustee's sale of collateral under a trust agreement.)

In *Re Gubelman*, 79 Fed. 2d 976, 2d Cir., the Court held that a federal court under Sec. 66b of the Bankruptcy Act was empowered to act *sua sponte* or at the instance of a qualified creditor willing to undertake the trouble and expense of effecting the Court's distribution of the unclaimed dividends.

In *Re Vulcan & Reiter, Inc.*, 162 Fed. 2d 94, 2d Cir., the Court held that a creditor who had received all that he had bargained for in the course of an agreement of settlement or composition was not a creditor who could qualify as a person whose claim still remained to be paid in full; that he could not hope to share in any fund of unclaimed dividends which arose from a fellow creditor's failure to claim the dividends pro rated to him (See also *Brown* v. *Pennsylvania Canal Co.*, 235 Fed. 269, 247 Fed. 467, 279 Fed. 417, 3rd Cir.).

3. Notwithstanding the fact that in most cases of equity receiverships, including the instant case of *Equitable Trust Co.* v. *Western Pacific Railway and Denver & Rio Grande R. R. Co.*, federal jurisdiction was founded on diversity of citizenship, the several States in the United States and their courts have invariably pursued a hands-off policy. Petitioner does not know of any case reported

in standard law reports where anyone had insisted on having a State law relating to trusts and trust beneficiaries forced on the federal courts in the course of their liquidation of the affairs of an insolvent. In each case, a creditor's right to share in the insolvent's assets has been dependent on his proofs as a creditor of the insolvent and not on his proof as a beneficiary under a certain trust agreement.

The instant case appears to be the first case where the Supreme Court rule on diversity of jurisdiction (*Erie R. R.* v. *Tompkins*, 304 U. S. 64) was availed of to have a vague pronouncement of a State Court forced on a federal court to control its liquidation of an insolvent's affairs.

4. Respondent's silence and failure to meet petitioner's charge that the Court of Appeals herein had not complied with the conditions and requirements which the Supreme Court, in its wisdom and foresight, had imposed on federal courts for the latter's use of the rule of diversity of jurisdiction as liberalized by *Fidelity Union Trust Co.* v. *Fields*, 311 U. S. 169 and *West* v. *A. T. & T. Co.*, 311 U. S. 223 to embrace pronouncement of inferior courts that might be acceptable as authoritative State law, may be said to confirm petitioner's charge on that score.

Petitioner believes that it is sound law that before a federal court can say that it was bound to adhere to this Court's rule on diversity of jurisdiction as liberalized, there should be some showing on its part that it had complied with the requirement that it first "ascertain" the facts back of those pronouncements.

That the true facts in the two State cases were not first ascertained is borne out by the statement of the State court in the *Moscowitz* case that the facts in the federal case of *Louisville & Nashville*, *supra*, were so different

from those present in the *Moscowitz* case that the principles and law of the federal case were not applicable to the State case (Petitioner's Appx. F., p. 26a). It logically follows that if the facts in the State case were so different from those in the Federal case, then the law of the State case would not be applicable to the Federal case. And since the facts and the principles of equity and federal law of the *Louisville & Nashville R. R.* case are so strikingly similar to those in the instant or *Western Pacific Ry.* case, it must follow that the *Moscowitz* case cannot be analogous to the instant case.

And so with the other State case of *Continental B. & T. Co.*, where the facts in a referee's report have just come to light as an appendix to Respondent's brief. The referee therein has displayed such a misunderstanding of what was involved in the *Louisville & Nashville* case that one can be persuaded to accept his view that the facts in the *Continental* case were so different from those in the *Louisville & Nashville* case as to make the law of the two cases inapplicable to one another. There again the ultimate result would be that the law in the *Continental* case, would be inapplicable to the instant or *Western Pacific Ry.* case.

Apart from the disclosures on the face of the opinions in the two State cases, the examination of the court files in the *Moscowitz* case conclusively showed that the true facts in that case had brought it in line with the composition case of *Vulcan & Reiter*, *supra*, to which the instant case does not bear any likeness whatsoever.

Conclusion

From the foregoing, it must be evident that petitioner has not merely resorted to a technicality to persuade the Court to grant its writ herein. Petitioner has shown

what has actually resulted from the lower Court's omission to comply with a requirement which this Court imposed on federal courts when they undertake to make use of a liberalized version of the *Erie R. R.* v. *Tompkins* rule on diversity of jurisdiction, to wit, that they "ascertain" the true facts which lie back of the pronouncements in the State cases before they accept and make use of them as authoritative State law. A determination and judgment in her favor herein has been overturned to her prejudice and that of the 95% of bondholders of the Western Pacific Ry. Co. who have appeared herein. New law for the Court of Appeals for the Second and other circuits appears to have been made herein in contrast to the law heretofore established and followed with confidence as to its correctness.

Respectfully submitted,

EDWARD F. UNGER,
Attorney for Petitioner.

ROBERT M. COWEN,
BERNARD COWEN,
Of Counsel.